Nos. 11,519 and 11,880

IN THE

United States Court of Appeals

For the Ninth Circuit

See vol. 7460

UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

On Appeals from the District Court of the United States for the Northern District of California, Southern Division.

REPLY BRIEF FOR THE UNITED STATES.

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PRELIMINARY ANALYSIS.

The United States has suffered a loss by being compelled to discharge decrees against itself because of the failure of Arrow Stevedoring Company to properly open and secure a hatch cover on the USS Edge-

combe. The case thus presents the question of Arrow's liability to the United States as a result of Arrow's negligence in the performance of its contract to carefully and properly unload a government vessel, including the opening and closing of her hatches necessary therefor.

There is a contract of indemnity implied by law in favor of the party employing a contractor to perform services whenever the contractor's negligence imposes loss or damage upon him. *Dunn v. Uvalde Asphalt Paving Co.* (1903), 175 N.Y. 214, 217-218, 67 N.E. 439. Arrow can escape liability under this implied contract only by proving either that it did not contract to do the work or that the express terms of the contract negative the ordinary implied contract to indemnify the United States.

By the terms of the contract, as well as the actual facts of this particular case, the Government turned over to Arrow the exclusive control of the work of unloading and of the opening of the hatches being unloaded. No government personnel supervised the work of opening the hatches involved or the unloading of their cargo and no government employee was present either when Arrow's men raised the hatch cover and left it open without fastening it safely, or when Arrow's foreman put his men to work beneath the improperly fastened cover with the result that it fell, injuring libelants.

Evidence was given of a common practice of ship's personnel to aid the stevedores in opening the hatches. That practice was not followed in this case and, in

view of the contract, it seems probable that if it had been the loaned servant doctrine would apply and any negligence of ship's personnel in performing Arrow's work of opening hatches must be attributed to Arrow, the contracting stevedore to whom the Government had delegated that work, and not to the United States which had employed Arrow to do it. Cf. *Anderson v. Standard Oil Co.* (1909), 212 U.S. 215, 220-225; *Denton v. Yazoo RR. Co.* (1932), 284 U.S. 305, 308. Even if the loaned servant rule did not apply and the ship's personnel had in fact undertaken to open and secure the hatch covers, this action of ship's personnel could not amend the contract so as to relieve Arrow from its contractual undertaking to properly and safely open and secure the hatch covers. It was Arrow's contractual duty in all events to see that this was safely done and while the ship's personnel might aid Arrow, the latter could not redelegate to the ship's officers its contractual duty to see that all was safe. Such a redelegation would be an amendment of the contract which could be effected only by the contracting officer in writing and with the formalities prescribed by the contract.

By the terms of the contract relating to "Liability and Indemnity" the ordinary implied right of indemnity is expressly declared.[1] Arrow is to indemnify the Government whenever it is at fault; the Government is to bear the loss when the fault is on its side. No provision is made for the case where each is at fault

[1]The provision involved is Article 26 of the original contract, Article 21 of the amended contract in effect at the time of the accident. There is no difference.

but the parties are left to the differing rules of the common and maritime law, whichever is applicable in the circumstances of the case. Where the common law applies, the Government is entitled to indemnity under the rule of *Washington Gas Light Co. v. District of Columbia* (1896), 161 U.S. 316. Where, as here, the accident was on navigable waters, the law maritime applies and the Government is equally entitled, if appropriate, to contribution. *Portel v. United States* (S.D. N.Y.), 1949 A.M.C. 487, 491; see *American Stevedores v. Porello* (1947), 330 U.S. 446, 458.

SUMMARY OF THE PARTIES' CONTENTIONS.

The fundamental issue of the case is whether anything in the conduct of the parties and the provisions of the contract regarding "Liability and Indemnity" operates to relieve Arrow of liability to the United States under the implied contract of indemnity for Arrow's failure properly and safely to fasten open the hatch cover as it contracted with the Government to do.

To escape liability Arrow contends that: (1) It called upon the ship's officers to perform its contractual duty to see that the hatches were safely opened and they did not refuse but failed to do the work properly; (2) It is released because the Government's decision not to appeal the decrees in favor of libelants establishes not merely the liability of the United States to libelants but its sole responsibility, exclusive of Arrow, for their injury; (3) It is exonerated by the

contract provisions that Arrow should be liable for the negligence of its own employees, equipment and gear while the Government should be liable for the negligence of government employees or "default of ship's or other gear supplied by the Government," since those provisions must be construed as meaning that, where the active negligence of Arrow's employees, together with an unsuitable locking device for a hatch cover, combine to create an unseaworthy situation which results in loss or damage, Arrow is relieved of liability for its breach of contract to do the work properly; and (4) The Longshoremen's Compensation Act by providing an exclusive remedy for the injured employee also relieves Arrow of liability for its breach of its contractual undertaking carefully and properly to unload the vessel, including the proper opening and securing of its hatches. Finally, (5) Arrow seeks to relieve itself and its underwriters from the contractual provision by which it waived subrogation to the right of the libelants against the United States by arguing the provisions apply only to explosive risks.

The United States insists that Arrow is liable under its contract because: (1) Arrow contracted to stevedore the vessel properly and safely and it was its duty not only to open the hatches safely but also not to work its men in the hatch until it had itself seen that the cover had been safely opened and secured even after it had found the locking devices of the cover were unsuitable and defective and required lashing; (2) Appeal of the decrees in favor of libelants could have no bearing on the present case since the duty of

the United States to furnish libelants a safe place to work being non-delegable, the United States was liable to them for Arrow's failure to perform its contract properly and safely to open and secure the hatch covers; (3) Arrow's contractual duty to perform its work safely is paramount and the clauses as to indemnity mean that Arrow is never relieved of liability for breach of its duty properly and safely to open and secure the hatch covers, but is relieved of liability where, despite its proper performance of its contract, loss or damage results entirely without its fault and solely by reason of latent defects; (4) the Longshoremen's Compensation Act has no effect on the liability of Arrow to the United States; and, finally, (5) Arrow contracted to procure compensation insurance in the standard form by which its liability in the present case was insured and further contracted that the subrogation of its underwriter to the claim of the injured libelants was waived in all cases.

ARGUMENT.

I.

THE CONTRACT REQUIRED ARROW TO OPEN THE HATCH AND SAFELY FASTEN THE HATCH COVER AND DID NOT PERMIT IT TO RE-DELEGATE THIS DUTY TO THE SHIP'S PERSONNEL.

There is no merit whatever in Arrow's arguments that the sole proximate cause of the accident was the disputed circumstance that the locking device on the hatch cover could not be successfully operated by Arrow's men and that Arrow was not negligent in

sending its men to work under the hatch cover once it had told the ship's officers that Arrow's men were leaving the cover open in an unsafe condition. The primary responsibility of Arrow for failing to lash the cover or else keeping its men out of that hatch is evident. This reckless breach of Arrow's contractual duty was proximate in time and the United States was not bound reasonably to expect it.

This is not a case where Arrow had properly and safely fastened the hatch cover and because of a latent defect the locking device broke and the cover fell. In such a case, admittedly the defect would be the sole proximate cause of the accident. But that is not this case. Here the breach of Arrow's contractual duty to open and fasten the cover safely caused the loss and damage. And the United States is entitled to recover the loss it sustained by Arrow's breach.

Arrow makes much of the "unsatisfactory character" of the hostile testimony of its employees when the Government was compelled to call them as the only eyewitnesses. It refers to its employees throughout as the "Government's own witnesses" and disregards their disposition toward the parties litigant. We submit that their hostility is natural. All testimony concerning the actual opening of the hatch cover by Arrow's men, their inability to properly secure the cover in the open position, and the circumstances of its fall could be obtained only from employees of Arrow. Reading the record shows they were, not unnaturally, disposed to favor Arrow and to put the Government in the worst light possible. The only testimony by government personnel was that of Herbert

Carnes, boatswain's mate, second class, on the Edgecombe, who only saw the cover before it was opened and after it had fallen and could only testify that materials were at hand to lash the cover safely and that his men could have secured it safely by proper use of the locking devices.

In the face of these facts, Arrow's insistence upon the "unsatisfactory" character of the testimony of its employees when testifying as "the Government's own witnesses" seems to mean that their refusal to disregard their own interest and put all possible blame on Arrow renders even their grudging concessions against their employer unworthy of belief. But Arrow admits that in fact its men opened and failed to secure the hatch cover safely: "The stevedores of the night shift opened the hatch cover and secured it as well as they could"—with the locking device (Br. 11). This, we submit, is a virtual confession of liability.

It was Arrow's paid contractual duty not to fasten the hatch cover "as well as they could" but to do it properly and safely. It is usual practice to lash such covers for safety when there is no locking device or in addition to the locking device where that appears necessary. The contract provided that Arrow would supply usual gear and even if the ship had not kept gear available for lashing, it was Arrow's duty to furnish the necessary gear.[2] Moreover, Carnes, the boatswain responsible for the hatch, testified expressly that the ship kept turnbuckles and rigging right by

[2]Article 1, A, provides: "The Contractor, as an independent contractor, agrees to load and discharge cargoes and in connection therewith, to furnish equipment and services and perform all the duties of a stevedore * * *."

the covers for this purpose (Wms. R. 229). This gear was at hand to be put on at once, once the accident had happened. The admissions of Arrow's longshoremen who fastened the covers is plain that their foreman paid no attention to the proper fastening of the covers with the dogs or hooks. They "just slapped them on" (Mchl. R. 95), and one of Arrow's men, who did the fastening, admitted the covers should have been lashed and that "If I was a foreman I would do it myself" (Mchl. R. 92-93).

Although the United States paid Arrow to open and fasten the hatches safely, the crux of Arrow's contentions in this Court, which were erroneously accepted by the court below and are now renewed, is that Arrow's duty to open the hatches properly and safely was fully performed when it told the ship's officers that its longshoremen had not done the work of opening the hatch properly and safely and asked the help of ship's crew (see Br. 12-18). Thus Arrow asserts that (Br. 12) it had no duty to inspect the hatch which it had opened to see if it was safe; that (Br. 13) since the ship lashed the cover after the accident, it was the ship's duty and not that of Arrow to lash it before; that (Br. 13) the Government was required not only to make available to Arrow but to introduce in evidence itself certain written orders (confirming that in accordance with their standard form contracts, stevedores, such as Arrow, were required to open the hatches and while ship's personnel might aid them, they were not to relieve them of the performance of the duty for which they were paid); that (Br. 14-16) when Arrow's men asked the ship

to aid them in fastening the hatch cover, Arrow no longer had any duty to inspect or otherwise ascertain if it had been done (this despite the fact that the officer had said only that he would do it sometime next morning when it was convenient (Mchl. R. 55, 59)).

It is evident from the foregoing that this case involves no question of trial *de novo*. The error of the court below was not in appreciating the facts but in accepting these contentions of Arrow as to the respective duties of Arrow and the United States under the standard form contract and finding that the unseaworthy condition of the unsecured hatch cover was not only the fault of the United States which was under a non-delegable duty, but not the fault of Arrow whom the United States had employed to secure it. Consideration of the court's own essential findings shows that the locking device which the Navy personnel could work safely but which, it is claimed, the longshoreman could not, or at least did not work successfully, was not the cause of the accident. The locking device was the occasion but not the cause. The sole proximate cause of the unseaworthy condition of the open cover and of the resulting accident was the negligent failure of Arrow's foremen (a) to safely lash the cover as was Arrow's duty under the contract and (b) to keep its men out of the hatch until the cover was made safe whether by Arrow's own men, as required by the contract, or by the ship's personnel, as loaned servants of Arrow. That the locking device had to be handled in a particular way to work properly (see testimony of Carnes, the boatswain, sum-

marized in Government's brief, pp. 17-18) could not cause the accident without the supervening reckless conduct of Arrow in failing to perform its duty to lash the cover and sending its men to work in the unseaworthy hatch.

Appellee's only escape is to have this Court, like the court below, adopt its argument that "Arrow's foreman and his men did all that was customary and permissible on Navy ships in the way of checking equipment; they looked at the hatch door and it appeared to be safe" (Br. 17). We submit that only the contracting officer by amendment in writing could thus alter Arrow's written obligation under Article 6 of the contract to open and secure the hatch covers safely and properly.

II.

ARROW IS NOT RELIEVED OF LIABILITY TO THE GOVERNMENT BECAUSE NO APPEAL WAS TAKEN FROM THE DECREES IN FAVOR OF LIBELANTS.

Arrow further contends that the Government is barred from recovery-over by its decision not to appeal the decrees in favor of libelants. Arrow asserts (Br. 28) that "In a tort case, liability cannot be fastened without fault" and argues that the only basis for government liability is "the vessel's unseaworthiness, or the negligence of its employees." But this disregards the non-delegable duty of the Government, as shipowner, to furnish a seaworthy ship and a safe place of employment to Arrow's employees such as libelants. See *Porello v. United States* (2d Cir., 1946),

153 F. 2d 605, 607, affirmed on this point *sub nom. American Stevedores v. Porello* (1947), 330 U.S. 446; see *Seas Shipping Co. v. Sieracki* (1946), 328 U.S. 85. It was no ground of escape for the Government that it employed Arrow to open the hatch and secure the cover in a proper and seaworthy fashion, if need be by lashing. It was no defense to the Government that the sole proximate cause of the unseaworthy condition of the raised hatch cover was the fault of Arrow in failing properly and safely to secure it in the open position. The negligence of Arrow's employees in leaving the hatch cover in an unseaworthy condition imposed liability on the United States just as surely as if the individuals involved had been employees of the United States.

Cases involving negligent handling of winches, such as *Desiano v. United States* (S.D.N.Y.), 1946 A.M.C. 544, and *Shelton v. Seas Shipping Co.* (E.D. Pa.), 1947 A.M.C. 1526, where the negligence of the stevedore's men did not contribute to creating an unseaworthy condition of the vessel, are totally unrelated to the present case. Here the fact that the locking device for the hatch cover could be successfully operated by Navy personnel who knew how to work it but not by the longshoremen was not *per se* an unseaworthy condition endangering the longshoremen. It became such only when Arrow's employees opened the hatch, found they could not make the cover safe with its locking device alone, but failed either properly to secure the cover by lashing or other ordinary means, or to reclose the cover. This circumstance that the unseaworthy condition of the hatch cover was ex-

clusively due to the negligent manner in which Arrow opened and left it unsecured did not afford the Government a defense against libelant merely because the active negligence—the failure to exercise the last clear chance to prevent the accident—was that of Arrow to whom the Government had delegated the work.

We submit the United States is not required to take a futile appeal as a condition to enforcing its right to recover for Arrow's negligence in the performance of its contractual duty to carefully stevedore the Government's vessel, including the safe raising and fastening of the hatch covers.

III.

ARROW IS NOT RELIEVED OF LIABILITY UNDER THE IMPLIED CONTRACT TO INDEMNIFY THE GOVERNMENT FOR DEFECTIVE PERFORMANCE UNLESS IT IS WHOLLY FREE FROM FAULT.

Absent express contractual language to the contrary, there is an implied undertaking in every contract to perform services that the contractor will indemnify the person hiring him against liability due to the contractor's negligence. *Dunn v. Uvalde Asphalt Paving Co.* (1903), 175 N.Y. 214, 217-218, 67 N.E. 439.[3] But

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[3]There the court said: "The contract between the plaintiff and the defendant was informal and contained no express stipulation that the defendant should be indemnified against liability or loss which might arise from the negligent performance by the plaintiff of the work which he had engaged to do. The plaintiff's alleged liability must, therefore, be predicated upon the rule of law under which a person guilty of negligence is charged with the responsibility for his wrongful act, not only directly to the person in-

Arrow seeks to construe the Government's standard contract so as to relieve itself of liability for breach of its undertaking properly and safely to open and secure the hatch cover and shift the liability from the underwriters whom the Government required it to obtain. It argues (Br. 31) that the provisions of the contract must be construed not as declarations of the general law but as in contravention of it. The contract provides:

> (b) The Contractor shall be liable to the Government for any loss or damage which may be sustained by the Government as a result of the *negligence or wrongful acts or omissions of the Contractor's officers, agents or employees* or through fault of its *equipment or gear,* subject, however, to the following limitations and conditions:
>
> * * * * * * *
>
> (2) The Contractor shall not be responsible to the United States for any loss or damage resulting from *any act or omission of any employee of the Government,* or resulting from compliance by officers, agents, or employees of the Contractor with specific directions of the Port Director, NTS, Twelfth Naval District. Nor shall the Contractor be so responsible for any such loss or damage resulting from default of *ships or other gear* supplied by the Government.

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jured, but indirectly to a person who is legally liable therefor. In the latter case the wrongdoer stands in the relation of indemnitor to the person who has been held legally liable, and the right to indemnity rests upon the principle that every one is responsible for the consequences of his own wrong, and if another person has been compelled to pay the damages which the wrongdoer should have paid the latter becomes liable to the former. (*Village of Port Jervis v. First Nat. Bank,* 96 N.Y. 550; *Oceanic S. N. Co. v. Compania T. E.,* 134 N. Y. 461.)''

This, it seems plain, merely declares the general law in cases of sole fault of either party. But situations involving the fault of both are left to the determination of the regular rules of common or maritime law, whichever of those differing rules may be applicable.

It is the well-known and obvious purpose of such language to effect a formal declaration of the general rules of law respecting the impact of loss occurring in the course of the performance of the contract so as expressly to exclude any varying rules of local law. It is familiar that between private parties the rule of *Erie RR. Co. v. Tompkins* (1938), 304 U.S. 64, prescribes the application of the local law except to where the law maritime controls. Recent cases have reestablished that acts and transactions involving the United States are to be judged by federal and not local law. *Clearfield Trust Co. v. United States* (1943), 318 U.S. 363, 366, and *Allegheny County v. United States* (1944), 322 U.S. 174, 181-183 (contracts); *United States v. Standard Oil Co.* (1947), 332 U.S. 301, 305-310 (torts).[4] But the practice of government contracting officers of expressly declaring in their contracts the rules intended to be applicable so as to preclude the application of possible unknown local variants has not been abandoned.

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[4]See *United States v. Robeson* (1835), 9 Pet. 319, 325, where the court declared, "The principles involved in this case are connected with the fiscal action of the Government, and they cannot depend upon the local practice or law of any state." Cf. *Irvine v. Marshall* (1857), 20 How. 558, 563; *Duncan v. United States* (1833), 7 Pet. 435, 449; *Cox v. United States* (1832), 6 Pet. 172, 203.

And for this very reason the contract here does not go further and declare a single rule applicable in all cases where stevedore and ship are both at fault. Under the familiar standard form compensation policy issued by all underwriters and which the Government's contracts require its stevedore contractors to procure it is provided:

> One (b) To Indemnify this Employer against loss *by reason of the liability imposed upon him by law* for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States or the Dominion of Canada * * *. (Emphasis supplied.)

The liability of the stevedore contractor in both-to-blame situations is thus insured only to the extent provided by the applicable common or maritime law and not to the extent of any broader contractual indemnity which the Government might insert in its contracts. Should the Government ask for more than the indemnity or contribution given by the general law, common and maritime, it would have to pay its contractors for the added premium—directly where cost-plus contracts are involved, indirectly in the case of competitive bidding or negotiated contracts. The government draftsmen therefore seek to obtain and preserve the broad rights of indemnity and contribution available under the applicable general law, but no more. But nothing in the contract indicates governmental intention to waive rights against Arrow in respect of which the latter has been required to insure

and thus to give the compensation underwriter a windfall at the expense of the United States.

How great is Arrow's effort to distort the contract is shown by its claim that the expression "ships or other gear supplied by the Government" when used in a stevedore contract should be construed as including such equipment as hatches and their covers and locking devices and its resort to Roget's Thesaurus for a definition of "gear" alone—not, it should be noticed, of "ships and other gear supplied by the [shipowner] Government." The meaning of the expression "ship's gear" in connection with the stevedoring of vessels is, of course, a matter of familiar usage in the shipping world. In the standard work of Joseph Leeming, *Modern Ship Stowage* (U. S. Department of Commerce, Industrial Series—No. 1), U. S. Government Printing Office, 1942, it is stated at page 33—

> The term "ship's gear" is used to describe the ship's deck winches, its cargo booms attached either to masts or kingposts, and the ropes or falls used in connection with the booms and winches for hoisting or lowering drafts of cargo.

It was in this sense that the contract employed it. And the contract expression "other gear" equally refers to other cargo-handling gear furnished by the shipowner. In this very article of the contract, where a broader meaning was intended so as to include equipment of all types—as in connection with the contract undertaking of the stevedore to hold the Government harmless—the expression chosen by the draftsmen was "fault of its *equipment* or gear." The

contract itself contains a definition of gear. In Article 1, D, it is provided:

> The vessel to be loaded or discharged shall be equipped with booms having all normal gear, such as guys, topping lifts, preventers and affixed cargo blocks. Normal gear is defined as a ship arriving alongside the dock with gear in condition to start work immediately on the type of cargo that is scheduled for handling first.

Arrow's attempt to distort the meaning of "ship's and other gear" must thus fall before the definition of the contract itself.

We submit, therefore, that the meaning of the contract is clear and that Arrow and its underwriters are not relieved of their liability to the United States under the implied contract of indemnity and the applicable general law.

IV.

ARROW IS NOT RELIEVED OF LIABILITY TO THE GOVERNMENT BY SECTION 5 OF THE LONGSHOREMEN'S COMPENSATION ACT.

In Arrow's view of the case (Br. 36), recovery-over under the implied contract of indemnity is barred by the language of Section 5 of the Compensation Act (33 U.S.C. 905) which declares liability under the Act to be "exclusive and in place of all other liability to * * * anyone otherwise entitled to recover damages from such employer." Passing over Arrow's rejection of the rule of *ejusdem generis,* which would require "anyone" to be restricted to anyone claiming on be-

half of the employee and those claiming through him, and Arrow's disregard of the purpose of the Act, which was to benefit injured employees, not to exonerate employers from liability to third parties for breach of contract, we find that Arrow's view was rejected by the Supreme Court in *American Stevedores v. Porello* (1947), 330 U.S. 446, 458.

In the *Porello* case the Second Circuit had first held that "Since the libelant has no cause of action against his employer, the United States can claim no contribution on the theory of a common liability which it has been compelled to pay" (153 F. 2d at 607). Subsequently, on petition for rehearing, it held that "the point may be considered left open since determination of the right of contribution is not essential to decision as to indemnity under respondent's contract" (153 F. 2d at 609). The Supreme Court, however, clearly rejected the suggestion that there would be no liability except for an express clause in the contract. After reviewing the indemnity clause of the contract and finding it ambiguous as to the extent of the indemnity provided, the Supreme Court declared, "If the district court interprets the contract not to apply to the facts of this case, the court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law" (330 U.S. at 458).

There can therefore be no possible doubt that in the view of the Supreme Court the compensation act does not bar recovery by the United States against Arrow. *Coal Operators Casualty Co. v. United States* (E.D. Pa., 1947), 76 F. Supp. 681, 682-683; *The S.S. Samo-*

var (N.D. Calif., 1947), 72 F. Supp. 574, 588; *Portel v. United States* (S.D. N.Y.), 1949 A.M.C. 487, 491. The unreported case of *Johnson v. United States* printed in appellee's appendix stands alone to the contrary and is, we submit, in error. It purports to rely upon *Frusteri v. United States,* 76 F. Supp. 667, 669. But that case held only that where the libel against the United States was dismissed there could be no claim that the impleading petition had introduced a new party liable to the employee-libelant. Thus the United States could have no claim for indemnity or contribution since it had suffered no loss. Examination of the cases cited at 76 F. Supp. 669 shows that Judge Inch was referring only to the exclusiveness of the compensation remedy so far as libelant was concerned. He was not holding that the compensation act abrogated the implied contract of indemnity incidental to every contract for the performance of services.

V.

IF NOT LIABLE-OVER ON ITS IMPLIED CONTRACT OF INDEMNITY, ARROW IS LIABLE ON ITS EXPRESS UNDERTAKING THAT ITS COMPENSATION UNDERWRITER AND ITSELF WOULD WAIVE SUBROGATION AGAINST THE UNITED STATES.

Arrow's unconscionable attempt to escape its agreement to waive any right to recover reimbursement from the United States for the amounts of the compensation payments made by itself and its underwriters scarcely deserves comment. Taking advantage of an obvious error in the numbering of the "Liability

and Indemnity'' article of the contract, Arrow argues that its attempt to obtain reimbursement of the amounts of compensation by asserting an equitable lien and right of subrogation to the claim of libelants against the United States is not the type of reimbursement and subrogation which it agreed should be waived (Br. 34). It further argues that, in any event, the provisions for waiver apply only to cases involving explosive risks and not to cases, like the present, which involve ordinary commercial risks (Br. 4, 34-35).

Arrow does not deny its attempt to obtain reimbursement indirectly from the United States and thus avoid the effect of its waiver. From the beginning Arrow and its underwriter have insisted that any recovery by libelants from the United States belongs to Arrow to the extent of the compensation payments and that Arrow has a lien thereon. The answers of Arrow in both cases expressly allege that Arrow caused compensation to be paid in the amount of $1,855.49 to Williams (Wms. R. 35) and in the amount of $1,282.41 to the heirs of Mitchell (Mchl. R. 21). In the *Williams* case Arrow induced the court to impose a lien in its favor in the amount of $1,855.49 upon libelant's recovery (Wms. R. 60). In the *Mitchell* case, although it plainly appears from the pleadings that the suit was for the benefit of the same identical heirs (Mchl. R. 4), the attempt to obtain an express declaration of the lien was not repeated.

A. Reading the simple language of the contract's waiver provision shows at a glance that indirect reimbursement to Arrow and its underwriters of the amount of the compensation payments which they

made to libelants is precisely the type of reimbursement which the United States was seeking to have waived. With emphasis supplied to the significant phrases, Arrow's undertaking was:

> *Notwithstanding any other provision of this contract,* the Contractor *agrees to waive any right of reimbursement* for loss or damage of any kind or character which it may have against the Government under any provision of this agreement *if said loss or damage is covered by insurance* and Contractor has collected or may collect for said loss or damage from the insurance company. The Contractor further agrees to have attached to and made a part of all insurance policies issued pursuant to this agreement on operations thereunder a rider by the terms of which *the insurance company agrees to waive any and all rights of subrogation which it may have against the United States by reason of any payment under said policy.*

We submit that this language is plain and that despite any other provision of the contract, Arrow and its underwriters agreed that they would not seek reimbursement from the United States of the amounts which the underwriters might pay to injured employees as workmen's compensation. That is what they attempted to do here.

Counsel assert, however, that "Arrow is not seeking 'reimbursement' by reason of any right 'against' the United States; its lien claims are on the judgments which were entered in favor of libelants" (Br. 34). But Arrow's contention is thus disingenuous in the extreme. The alleged equitable lien on libelants' judg-

ment which Arrow asserts is founded upon a claim of subrogation, to the extent of the compensation paid, to the rights of libelants to recover judgment against the United States. The purpose and effect of Arrow's claim of subrogation and equitable lien is, of course, to permit Arrow and its underwriter to obtain indirectly reimbursement from the United States of the compensation payments which the compensation insurance covered. Since the 1938 amendments to Section 33(b) of the Longshoremen's Act (33 U.S.C. 933(b)), there can no longer be any direct reimbursement. And it is just such indirect reimbursement from the United States which the contract was intended to require Arrow and its underwriter to give up.

An understanding of the meaning and application of the contract provision governing the waiver by Arrow and its compensation underwriters requires a review of the development of these matters since the 1938 amendment. Since the Government has, in effect, paid the cost of the compensation insurance premiums, it requires the contractor to have its compensation insurance carrier continue to bear the burden it was paid to assume and not shift it to the United States even where the latter was solely at fault. It is therefore essential to have all right to reimbursement waived, although since the amendment it is no longer direct but is indirect, through subrogation *pro tanto* to any claim of libelants against the United States together with the equitable lien created by the courts to implement such subrogation.

Prior to the 1938 amendment to Section 33(b) of the Longshoremen's Act (33 U.S.C. 933(b)), steve-

dore contractors such as Arrow and their compensation insurers could not make any attempt, like the present by Arrow, to escape the operation of their agreement to waive all rights of reimbursement and subrogation. Receipt of any compensation by an injured employee operated under the former law as an automatic statutory assignment whereby any cause of action of the employee against the United States passed directly to the employing contractor subject to the compensation insurer's right of subrogation. *Doleman v. Levine* (1935), 295 U.S. 221, 225.

Thus, prior to 1938, the waiver by the contractor and his underwriter of their rights of reimbursement and subrogation to the claim of the injured employee against the United States, made substantially in the language still found in the standard form government contract, prevented all possibility of either claiming to be subrogated to the rights of the injured employee. If the contractor or its compensation insurance carrier brought suit against the United States on the claim of the injured employee, the United States was able without more to assert as its special defense that recovery, to the extent that it reimbursed the contractor and insurance carrier for compensation, had been waived.

Since the 1938 amendment to Section 33(b), however, the previous automatic statutory assignment is confined to only those cases where payments of compensation had been made under an award by a deputy commissioner and excluded assignment from cases, like the present, where compensation was paid voluntarily. This has given rise to the present large num-

ber of cases where suit, instead of being brought in the name of the contractor to the use of the injured employee and to reimburse itself and its compensation insurer, is brought in the name of the injured employee for himself and also to the use of his employer, such as Arrow, to reimburse the latter and its compensation insurer for the compensation payments.

Where no question of waiver of reimbursement or subrogation against the party against whom the suit is brought is involved, the courts, since the 1938 amendment, protect the right of the employer and compensation insurer to be subrogated *pro tanto* to the recovery effected by the injured employee by recognizing an equitable lien in their favor upon the employee's recovery. *The Etna* (3d Cir., 1942), 138 F. (2d) 37, affirming (E.D. Pa., 1942) 46 F. Supp. 156.

Unquestionably the same rule would apply to suits against the United States were it not for the agreement by the contractor and compensation insurer to waive their rights to be reimbursed. But where, as in the present case, there has been a waiver of the rights to reimbursement and subrogation, the United States is still entitled to the waiver for which it stipulated and to the return by Arrow of the amount of the compensation payments which it has recovered by subrogation and equitable lien on the employee's judgment against the Government. The amendment of the statute should not defeat the intent of the contract.

We do not question Arrow's right *vis-a-vis* the libelants. It seems clear that the waiver of the right of the contractor to be reimbursed for the amount of

compensation payments and of the compensation insurer to be subrogated was for the benefit of the United States, not to give either the injured employee or the compensation insurer a windfall at the expense of the Government. The compensation insurer and the employee have no right to recover from the Government, as they already have in these cases, and then invoke the benefit of the waivers agreed upon between the Government, the contractor and the underwriter for the purpose of escaping their obligation to pay over to Arrow the amount of the compensation payments.

We submit that Arrow is entitled to reclaim from the libelants the amount of the compensation payments. But unless Arrow be held liable-over to the United States for idemnity or contribution, Arrow is liable to return to the United States the amounts of compensation which, in breach of its agreement not to seek reimbursement from the United States of amounts paid by the compensation insurance required by the Government, it has in fact been reimbursed by the United States on its claim as subrogee of libelants.

B. Arrow's contention that the waiver clause applies only to cases of explosive risks, not to ordinary commercial risks such as are here involved (Br. 34), is equally a distortion of the obvious meaning of Section (c) taken as a whole. The types of stevedoring work covered by the standard form Navy contract under which Arrow performed the services here involved were two: (1) stevedoring services of a nature

normally performed in peacetime commercial operations, and (2) services in connection with inherently dangerous cargo only handled in wartime such as ammunition, explosives and similar articles. With indication of the two distinct types, the pertinent language reads:

> (c) The services to be performed in pursuance of the provisions of this contract are incident to war activities of the Government and *will include* [1] *services* of a nature *normally performed* by the Contractor *in peace time commercial operations* with the risks and hazards normally incident thereto and *may involve* [2] the loading, discharging, handling, presence of proximity of ammunition, explosives, gasoline, and other *inherently dangerous cargoes.* It is understood that the consideration herein provided to be made to the Contractor for the services to be performed hereunder have been established with regard only to the *normal risks and hazards* involved in similar services *in peace time commercial operations,* but that such consideration does not include any allowance for the additional and extraordinary risks and hazards described above. To induce the Contractor to undertake the performance of *such services* [involving dangerous cargoes] for the consideration herein provided, and thus obtain for the Government the resulting benefit of such reduced consideration, the Government will hold the Contractor harmless against any loss, expense (including expense of litigation), and liability to third persons because of death, bodily injury, or property damage or destruction or otherwise of any kind whatsoever, irrespective of negligence of Contractor,

his officers, agents, servants or employees; subject, however, to the following conditions and limitations:

Provision as to indemnity in both types of operations are described in subparagraphs (1) to (3), by which the Government indemnifies only against loss exceeding $250,000 in explosive risk cases (see Appellee's Appendix, pp. ii-iv).

In respect of commercial type operations, stevedore contractors are required to assume the usual risks and indemnify the Government in accordance with preceding Section (b) and the general law (see *supra,* p. 14). In respect of explosive type operations, stevedore contractors are fully indemnified by the United States only (1) where the loss was attributable to explosives, (2) where the damage exceeds $250,000 and then only as to the excess, (3) where the contractor has not disobeyed government instructions and its officers and pier supervisors have not been negligent.

There is thus no evidence of any contractual intent to confine the waiver of paragraph (4) to cases where the Government is under a duty to indemnify. A glance at the "Liability and Indemnity" article of the contract (Appellee's Appendix, pp. i-iv) shows that the article's last paragraph, numbered (4) in that appendix, is not, as Arrow argues, one of the "conditions and limitations," like (1), (2) and (3), restricting the cases where the United States is to indemnify the contractor against loss resulting from non-commercial explosive operations. On the contrary, the

introductory expression of paragraph (4)—"Notwithstanding any other provision of this contract"—clearly shows the waiver provision to be entirely independent. It is obvious that what happened was a mistake in numbering, that in fact it should have been designated "(d)", not "(4)."[5] We submit that this Court should give effect to the clear meaning of the language itself and disregard the obvious error in numbering.

We submit that, just as prior to 1948, their waivers of reimbursement and subrogation prevented the contractor and compensation insurer from obtaining reimbursement from the Government of the amount of their compensation payments by suit in their own names, so now the same waivers prevent Arrow and its underwriters from obtaining reimbursement from the Government, although the suit against the Government is brought *pro tanto* to their use by the injured employee in his own name. Arrow and its underwriter hold the amounts thus obtained to the use of the United States and if not liable-over to the United States for indemnity and contribution, are liable to repay to the United States the amount of the compensation they have been reimbursed.

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[5]In the unpublished standard form prescribed by the Navy Department, the Liability and Indemnity article is not divided into lettered but into numbered sections and what are designated (a), (b) and (c) of the Arrow contract are designated (1), (2) and (3) of the prescribed form. As (3) of the prescribed form, designated (c) in Arrow's contract, is divided into paragraphs (1), (2) and (3), it is apparent that the typist who cut the mimeograph stencil for Arrow's contract made a mistake in carrying out an order to letter instead of number the sections. The paragraph numbered (4) should in fact have become (d).

CONCLUSION.

For the reasons stated, it is respectfully submitted that the decisions below should be reversed with appropriate instructions to enter decrees against Arrow.

Dated, San Francisco, California,
June 15, 1949.

Respectfully submitted,

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